

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

| | | |
|-------------------------------|---|------------|
| _____ |) | |
| JOSEPH F. HUTCHINSON, et al., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | CASE NO. |
| vs. |) | C-1-01-789 |
| |) | |
| FIFTH THIRD BANCORP, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

Deposition of: JAMES F. GIRTON

Pursuant to: Notice

Date and Time: Monday, May 23, 2005
9:00 a.m.

Place: Keating, Muething &
Klekamp, PLL
One East Fourth Street
Suite 1400
Cincinnati, Ohio 45202

Reporter: Patti Stachler, RMR, CRR
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I N D E X

JAMES F. GIRTON

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EXAMINATION BY MR. MEYER

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1 JAMES F. GIRTON

2 a witness herein, having been duly sworn, was examined
3 and deposed as follows:

4 EXAMINATION

5 BY MR. MEYER:

6 Q. Would you state your full name, please?

7 A. James Francis Girton.

8 Q. What is your address at home?

9 A. That's a good question. I'm moving.
10 Currently, it's 6536 Harnesswood, all one word, Court,
11 Mason, Ohio.

12 Q. I shouldn't have been complaining about my
13 trip downtown.

14 A. It's getting longer.

15 Q. Yours is formidable, isn't it?

16 A. Getting longer.

17 Q. How long have you lived at that address?

18 A. 11 years.

19 Q. And who is your employer?

20 A. Fifth Third Bank.

21 Q. How long have you worked for Fifth Third?

22 A. Six years.

23 Q. And what are your current duties?

24 A. I'm director of employee benefits.

25 Q. Have you ever had your deposition taken

1 before?

2 A. Yes.

3 Q. And when most recently?

4 A. 12 to 15 months ago.

5 Q. Okay. I thought you said minutes.

6 A. No, no. Sorry.

7 Q. What's going on?

8 A. Yeah, my wife --

9 Q. Was that in an employment capacity?

10 A. Yes.

11 Q. What was the subject matter of that
12 litigation, or your testimony?

13 A. An executive contract.

14 Q. Someone at Fifth Third?

15 A. Prior employee.

16 Q. How many times have you been deposed?

17 A. Five or six times.

18 Q. Was that primarily in relation to your
19 employment duties?

20 A. About half, yes.

21 Q. Have you --

22 A. I'm sorry. Yes, all of them.

23 Q. Have you ever been qualified to testify as an
24 expert in a case?

25 A. No.

1 Q. Have you ever testified in regard to an ESOP
2 plan before?

3 A. No.

4 Q. Based on your experience, I don't need to
5 tell you the rules. Be sure to answer every question
6 audibly with a yes or no because Patti cannot take down
7 nods of the head or whatever. You agree to do that?

8 A. Yes.

9 Q. If there's any question I ask you that you
10 don't understand, ask for clarification, because the
11 record will indicate what the answer is whether you
12 understand it or not. So will you agree to ask for any
13 clarification if you don't understand a question that I
14 ask?

15 A. I will do my best.

16 Q. I'll do my best to ask sensible, intelligent
17 questions.

18 Have your duties remained the same or have
19 they changed over the years at Fifth Third?

20 A. They have changed.

21 Q. What was your initial employment at Fifth
22 Third?

23 A. Director of employee benefits and
24 compensation.

25 Q. And your present title is director of

1 employee benefits?

2 A. Yes.

3 Q. When did the change occur?

4 A. In the last 24 months.

5 Q. And what did the change involve?

6 A. Primarily the size of Fifth Third, just the
7 size of the company changing and needed more focused
8 responsibility in areas.

9 Q. Have your day-to-day activities changed much
10 because of that change in structure?

11 A. Yes.

12 Q. To what extent?

13 A. Just more time in employee benefits, less in
14 compensation world.

15 Q. How many years have you been in the field of
16 employee benefits?

17 A. 19.

18 Q. Let's start out with your educational
19 background and then we'll work into your employment.
20 Tell me about your undergraduate and graduate degrees,
21 if any.

22 A. My undergraduate is a bachelor's of business
23 administration.

24 Q. When did you obtain that degree?

25 A. 1977.

1 Q. From?

2 A. University of Cincinnati.

3 Q. Did you take any courses relating to employee
4 benefits at the University of Cincinnati in that
5 program?

6 A. Not directly.

7 Q. Any additional education after University of
8 Cincinnati?

9 A. Certified public accountant.

10 Q. When did you obtain that?

11 A. Early '80s.

12 Q. Are you still active as a CPA?

13 A. No.

14 Q. When was the active status relinquished?

15 A. Around '86 -- 1986, 1987.

16 Q. Any other education?

17 A. No.

18 MR. FISCHER: When you say -- you mean formal
19 education?

20 BY MR. MEYER:

21 Q. Formal education.

22 A. No other formal.

23 Q. Let me ask you about seminars.

24 A. Okay.

25 Q. Other than on-the-job training, where did you

1 learn employee benefits, what settings?

2 A. I usually attend seminars once, if not twice,
3 a year.

4 Q. Is that mandatory either by your employer
5 or --

6 A. No.

7 Q. Did you attend any seminars on ESOPs?

8 A. Not specifically.

9 Q. Does Fifth Third put on any programs,
10 educational programs, in your area of employee
11 benefits?

12 A. No.

13 Q. Why don't you trace your work history after
14 graduating from the University of Cincinnati?

15 A. I started with Armco Steel in 1977, worked
16 there until roughly 1985.

17 Q. In what capacity?

18 A. Internal auditor.

19 Q. Did you do anything with regard to employee
20 benefits in that capacity?

21 A. Yes.

22 Q. Could you describe that?

23 A. Audited health care plans for our
24 self-insurance and did various work related to
25 pensionable earnings.

1 Q. I'm sorry?

2 A. Pensionable earnings. Did work related to
3 pensionable earnings for the pension plan. And audit
4 of 401(k) recordkeeping.

5 Q. Why did you leave Armco?

6 A. Wanted to stop traveling.

7 Q. Okay. Where did you work next?

8 A. General Electric.

9 Q. What was your job title?

10 A. I was in their procurement auditing group.

11 Q. For what years did you work for GE?

12 A. I don't remember exactly, but it was in the
13 time frame of 1985 through 1987, roughly in that time
14 period.

15 Q. Was that position at all related to employee
16 benefits?

17 A. No.

18 Q. After GE, where did you work?

19 A. Back to Armco.

20 Q. Same position?

21 A. No, different.

22 Q. What was your new position at Armco?

23 A. Went into employee benefits accounting.

24 Q. Did you obtain any special educational
25 training to assume that position, or was that learning

1 on the job based on what you already knew?

2 A. There were seminars that I would have
3 attended at that point in time for accounting for
4 employee benefits.

5 Q. Okay.

6 A. I don't remember specifically, but --

7 Q. And tell me the years that you were at Armco
8 on your second stint.

9 A. I was there from roughly 1987 through 1996.
10 One point of clarification is, Armco broke apart at
11 that point in time, and some point in time in the '90s,
12 '93 would be my guess, I went to AK Steel.

13 Q. Same position?

14 A. No. I switched over to director of employee
15 benefits. I served as supervisor of employee benefits
16 for a while at Armco. I left the accounting world and
17 went to supervisor of employee benefits and then over
18 to director of employee benefits for AK Steel.

19 Q. When you left AK Steel, did you go directly
20 to Fifth Third?

21 A. No.

22 Q. Where did you work after leaving AK Steel?

23 A. I did consulting work and financial planning
24 for approximately a one-year period.

25 Q. '96, '97?

1 A. Yes.

2 Q. What did you do after that?

3 A. Went to the Eastern Enterprises and worked in
4 their Ohio River Company division.

5 Q. What did you do for them?

6 A. Director of employee benefits.

7 Q. Prior to that, when you were doing consulting
8 and financial planning, was that with businesses or was
9 that individuals or both?

10 A. Yes. The consulting -- the benefits
11 consulting work would have been for companies.

12 Q. Did you consult with regard to any ESOP
13 programs for any of these companies?

14 A. No.

15 Q. What about Eastern, do they have an ESOP?

16 A. I don't believe so.

17 Q. How about AK Steel, do they have an ESOP?

18 A. Their 401(k) stock was wrapped in an ESOP.

19 Q. From Eastern, where did you go?

20 A. Fifth Third Bank.

21 Q. So what years at Eastern?

22 A. '97 -- mid '97 to late '98.

23 Q. Began with Fifth Third, what, late --

24 A. September of 1998.

25 Q. Has your employment with Fifth Third been

1 continuous?

2 A. Yes.

3 Q. Who did you report to when you were initially
4 hired?

5 A. Paul Reynolds.

6 Q. Who do you report to now?

7 A. Pete Pesce.

8 Q. What is his job title?

9 A. Pete Pesce is the executive vice president,
10 human resources.

11 Q. Do you know what Paul Reynolds' title was
12 when you reported to him?

13 A. Executive vice president and corporate
14 counsel.

15 Q. For what years did you report to Paul
16 Reynolds?

17 A. 1998 through probably 1999.

18 Q. Then did you start reporting to Mr. Pesce?

19 A. No. Mr. Pesce is as of Friday.

20 Q. Oh, okay. So who is after Reynolds?

21 A. Lee Ashton.

22 Q. What was his job title?

23 A. He was the manager of human resources.

24 Q. Back in the -- that '98, '99 time frame, how
25 many reports would you have to yourself?

1 A. 15 to 20.

2 Q. How about Marjorie Rybka, is she one of your
3 reports?

4 A. Yes.

5 Q. Mr. Levo?

6 A. Yes, he would have reported to Marj.

7 Q. M-a-r-j?

8 A. Yes.

9 Q. Could you tell me your first involvement with
10 the Suburban ESOP?

11 A. It would have been probably in 1999, 2000
12 time frame. Direct involvement. Obviously, I had
13 responsibility for benefit plans when I came on
14 board.

15 Q. When you did come on board, what did you do
16 initially to learn the Fifth Third benefit plans,
17 things that had been in place when you arrived?

18 A. Just discussions with the managers that were
19 there when I got on board.

20 Q. Did you discuss the ESOP -- the Suburban ESOP
21 with any manager?

22 A. Not at that point in time.

23 Q. At some point did you?

24 A. Yeah. We would have reviewed all the
25 outstanding benefit plans we had at that point.

1 Q. At what point in time, when you were hired?

2 A. Yes.

3 Q. Do you recall any discussions about the
4 Suburban ESOP, somebody bringing you up to speed on
5 that particular plan?

6 A. I don't remember anything specifically. We
7 had a -- an acquisition control list of all the
8 activity that would have -- of all outstanding plans.

9 Q. Was there somebody in particular in charge of
10 that list or of those plans of entities that had been
11 acquired? Was that any separate responsibility or was
12 that rolled into your department?

13 MR. FISCHER: Objection to form. Go ahead.

14 A. Could you repeat the question?

15 BY MR. MEYER:

16 Q. Yes, sir. Was there anybody specifically in
17 charge of the acquisitions control list as far as
18 plans? Was there any particular individual riding herd
19 over that?

20 A. With a list -- the activity I would have
21 reviewed would have been a list prepared by outside
22 counsel.

23 Q. Who would that have been?

24 A. Steve Goodson.

25 Q. Who is Steve Goodson?

1 A. He's an attorney with KMK.

2 Q. Is he the person that primarily brought you
3 up to date with regard to these plans from acquired
4 institutions?

5 MR. FISCHER: Objection. To the extent you
6 can answer that without revealing attorney/client
7 communications, you can answer the question. To
8 the extent you can answer it without revealing
9 attorney/client communications, you can answer the
10 question.

11 A. He would have been very important in that.
12 BY MR. MEYER:

13 Q. Without telling me what he said, did he
14 describe the Suburban ESOP plan to you?

15 MR. FISCHER: Objection. That calls for a
16 yes or no answer. You can answer yes or no, but
17 don't tell what was said to you.

18 A. Could you repeat the question, please?
19 BY MR. MEYER:

20 Q. Yes, sir. Did Mr. Goodson describe the
21 Suburban ESOP plan to you?

22 MR. FISCHER: Same instruction.

23 A. I really don't recall.

24 BY MR. MEYER:

25 Q. Who else was in the group, if there was more

1 than Goodson? Who was involved in bringing you up to
2 speed on these plans?

3 A. Marj Rybka and Paul Reynolds.

4 Q. As the result of that process, did you learn
5 whether or not Steve Goodson had been involved in
6 negotiating the merger between Fifth Third and
7 Suburban?

8 MR. FISCHER: Now, what Marj told you, you
9 can tell him. You can't tell him what Paul told
10 you.

11 THE WITNESS: Okay.

12 MR. FISCHER: He's counsel to the bank.

13 A. I did not know at that point that Steve had
14 negotiated -- if he had negotiated that contract.

15 BY MR. MEYER:

16 Q. When did you learn that he was involved in
17 negotiations?

18 MR. FISCHER: Objection. To the extent it
19 calls for revealing attorney/client
20 communications, don't answer that question.

21 A. I'm not sure that I know that Steve did
22 negotiate that deal. I'm not sure I know who did.

23 BY MR. MEYER:

24 Q. Okay. We know that you didn't because you
25 weren't there?

1 A. That's correct.

2 MR. FISCHER: Can we just take a one-minute
3 break? I want to talk to him about privilege for
4 a second if you want to continue down that road.

5 MR. MEYER: I'm finished for the moment.

6 MR. FISCHER: Please?

7 MR. MEYER: I'm finished with that topic.

8 MR. FISCHER: Okay. Let's go ahead.

9 MR. MEYER: I guess you and I are going to
10 have to have a discussion about that privilege,
11 also.

12 BY MR. MEYER:

13 Q. Could you just generally describe your
14 experience with ESOP since you've been employed by
15 Fifth Third?

16 MR. FISCHER: Objection to the broad
17 question. Form. Go ahead, you can answer.

18 A. The Fifth Third 401(k) plan had an ESOP
19 feature. We've acquired other plans that are ESOPs.

20 BY MR. MEYER:

21 Q. Do you know about how many?

22 A. Acquisitions? How many acquisitions?

23 Q. Yes, involving ESOPs, correct.

24 A. Four to five, that I can think of.

25 Q. In any of those four to five acquisitions

1 where you have obtained or merged with an institution
2 that had an ESOP, is there a general approach which
3 Fifth Third has developed toward those, or is it
4 specific to each individual case?

5 A. It would vary for each case.

6 Q. Okay. To what extent did the Fifth Third
7 handling of the Suburban ESOP differ from the other
8 four or five?

9 MR. FISCHER: Objection. We've already
10 established he wasn't there. Go ahead, answer the
11 question.

12 BY MR. MEYER:

13 Q. Let me ask a foundation question. From the
14 time that you did -- you were hired at Fifth Third
15 until the Suburban ESOP was terminated, you did have
16 responsibilities with regard to that ESOP, did you
17 not?

18 A. Yes.

19 Q. So for what period of time did you -- were
20 you involved with the Suburban ESOP?

21 A. I probably started working on cleaning up
22 acquired plans in the early 1999-type time period.

23 Q. Did you have any particular responsibilities
24 in cleaning up the Suburban ESOP plan?

25 A. Yes.

1 Q. What was that?

2 A. Paying out the benefits. I would have
3 oversaw paying out any benefits. I would have oversaw
4 termination of that plan, amending of the plan and a
5 general review of what to do with that plan.

6 Q. What was the decision in the general review
7 as to what to do with the plan?

8 A. Well, the first thing that was done was to
9 move the employees onto the Fifth Third benefit
10 program.

11 Q. How was that accomplished?

12 A. Stopping eligibility -- or creating
13 eligibility under the Fifth Third plan, amending the
14 Fifth Third plan to make them eligible for that plan.

15 Q. Are you talking about the ESOP participants
16 becoming eligible for the Fifth Third plan?

17 A. Yes, the employees who worked for Suburban
18 who were still participating in the ESOP plan, to make
19 them eligible under the Fifth Third plan.

20 Q. Okay. So that was one part of the process of
21 cleaning up, as you say, the Suburban ESOP?

22 A. Yes.

23 Q. Anything else involved in cleaning up the
24 Suburban ESOP?

25 A. The plan was amended to allow -- the best of

1 my memory, is to allow employees to participate --
2 current Fifth Third employees to participate in that
3 ESOP plan.

4 Q. Did you have any input into that decision?

5 A. Yes.

6 Q. What was your input?

7 A. My input was to allow employees to
8 participate into that ESOP plan.

9 Q. Was that your recommendation?

10 A. Yes.

11 MR. FISCHER: You got to wait 'til he
12 finishes the question.

13 MR. MEYER: I was finished. We're doing
14 fine.

15 BY MR. MEYER:

16 Q. So as far as you know, you originated that
17 concept of allowing current Fifth Third employees to
18 enter into the Suburban ESOP?

19 A. I believe so.

20 Q. Did you make a similar recommendation to any
21 other ESOPs on the acquisition list?

22 A. Similar, yes.

23 Q. And which ones were those?

24 A. All the ones that I've dealt with.

25 Q. You said four or five. Can you tell me which

1 ones actually you opened them up to current Fifth Third
2 employees?

3 A. Similar -- similar in the sense that all the
4 ESOP plans were dealt with in a manner to wind down so
5 that we terminate those plans.

6 Q. With regard to anyone other than the Suburban
7 ESOP, did you wind them down by allowing current Fifth
8 Third employees to participate in those ESOPs?

9 A. I don't recall specifically if that technique
10 was used. I don't remember specifically.

11 Q. So as you sit here today, other than the
12 Suburban ESOP, you cannot recall any other ESOP of an
13 acquired organization that you permitted current Fifth
14 Third employees to enter the participation ranks?

15 A. Not specifically. The plans would have been
16 amended in a fashion similar to that. Whether it was
17 amended to merge the Fifth Third plans and an ESOP
18 plan, I don't remember all the specific amendments that
19 were involved in those four or five plans. But the
20 techniques would have been similar in nature, a
21 similar-type outcome.

22 Q. The outcome being what, that the acquired
23 company's ESOP sort of merged into the Fifth Third
24 plan?

25 A. Right, or Fifth Third plan would have merged

1 into that plan. The technique being to merge the
2 assets into a plan or the Fifth Third plan into that
3 plan. I just don't recall specifically what the ESOP
4 plans -- the methods that were used.

5 Q. But as I understand you, the ultimate outcome
6 is the same whereby the acquired company's ESOP is
7 merged into the Fifth Third plan?

8 A. The ultimate outcome is that the plan is
9 either merged or terminated.

10 Q. Okay. What happened in the Suburban ESOP
11 case? Was it merged or terminated?

12 A. It was terminated.

13 Q. Okay. Were the participants given an option
14 to transfer their allocated share into the Fifth Third
15 plan?

16 A. Yes.

17 Q. So how would you describe that? Is that a --
18 is that a termination merger, or what would you call
19 that? How would you describe that technique for
20 cleaning up that Suburban ESOP?

21 A. The plan was amended to allow participants
22 into the plan, and terminated. The rollover provision
23 is required by code, or can be required by code, is
24 permissible by code.

25 Q. Now, have you reviewed any documents in

1 preparation for your deposition here today?

2 A. Yes.

3 Q. What documents have you reviewed?

4 A. The filing that was submitted.

5 Q. To whom?

6 A. The court. I'm not sure of the proper term.
7 The complaint or the -- I'm not sure of the legal term
8 for that document.

9 Q. So it was a court document?

10 A. Yes.

11 Q. Any other documents?

12 A. Yes. I reviewed a letter I wrote to the
13 participants in the Suburban plan and I reviewed
14 memos -- two letters I was copied on responding to
15 questions that Mr. Goodson had prepared.

16 Q. I didn't quite understand that. You were
17 copied on memos that Mr. Goodson prepared?

18 A. Yes. The KMK -- they were letters from Steve
19 Goodson to -- I believe one was Chris Henn and one was
20 an attorney.

21 Q. Any other documents that you reviewed?

22 A. The affiliation agreement, and there was an
23 exhibit or schedule detailing a plan for dealing with
24 the ESOP. I don't remember the exact name of the
25 document.

1 Q. Timetable?

2 A. Yes.

3 Q. Any other documents you can recall looking
4 at?

5 A. None that I can remember.

6 Q. When did you last review the affiliation
7 agreement?

8 A. Last week. Some day last week.

9 Q. Is that when you reviewed all these
10 documents, last week?

11 A. Yes.

12 Q. Pat and I have had some problem in locating
13 the documents relating to the Suburban ESOP. Can you
14 shed some light on where documents are retained
15 relating to this ESOP plan?

16 A. You'd like a plan document? I mean, like the
17 legal plan document?

18 Q. Any documents relating to the Suburban ESOP,
19 where would they be kept, whose office, what files?

20 A. They should be kept in my office, in my area
21 of responsibility.

22 Q. I take it that's a fairly large area?

23 A. It is.

24 Q. Okay. Are they -- what's your filing system?
25 How do you keep them together relating to the Suburban

1 ESOP?

2 A. We have -- we keep a file of each -- we try
3 to keep a file of each acquisition that we do.

4 Q. When you review the affiliation agreement, is
5 that where you found it, in this file?

6 A. The affiliation -- the version I read last
7 week?

8 Q. Let's start with that, right.

9 A. No. I was probably given the document to
10 review for this case.

11 Q. So in your review you didn't go to these
12 files in your office and review any of those files on
13 your own? You just reviewed what was given to you?
14 You tell me what happened.

15 MR. FISCHER: Objection to form. Go ahead.

16 A. I would review the files that were given to
17 me.

18 BY MR. MEYER:

19 Q. Where is this area in your office where these
20 files are maintained?

21 A. We have a locked storage room that we
22 maintain employee files and all the confidential
23 files.

24 Q. Although you didn't review the affiliation
25 agreement from the files in that locked storage room,

1 is that the kind of document that would be maintained
2 there?

3 A. Yes.

4 Q. Tell me some other types of documents that
5 would be there related to the Suburban ESOP; such as a
6 list of participants.

7 A. I don't know that there was one there for the
8 Suburban file, but that -- we would usually keep a
9 roster of employees, not necessarily which plan they
10 participated in, in that file. That's something we
11 would keep in that type of file.

12 Q. Related to that particular plan, is that what
13 you mean?

14 A. Related to that bank that we would purchase.
15 We would keep a roster of employees. Usually we try to
16 keep a roster of employees.

17 Q. Let's look at a document and you tell me
18 where these backup documents would be retained. We'll
19 mark this as Exhibit A to your deposition.

20 MR. MEYER: Off the record.

21 (Off the record.)

22 (Plaintiffs' Exhibit 17 was marked for
23 identification.)

24 BY MR. MEYER:

25 Q. All right. If you would review what's been

1 marked as Exhibit 17 and tell us if you know what this
2 document is.

3 A. Yes. It's the 5500 that would have been
4 filed for plan year '97 for Suburban's ESOP.

5 Q. Just so the record is clear, the year we're
6 talking about is July 1, 1997 through June 30, 1998; is
7 that correct?

8 A. That's correct.

9 Q. So this is -- you would call this the 1997
10 tax form?

11 A. Yes. I only grin because the midyear plans
12 are somewhat confusing.

13 Q. Right. Now, you signed this document,
14 correct?

15 A. Yes.

16 Q. Okay. So it was actually prepared in 1999
17 for year ending 6/30/98, correct?

18 A. That's correct.

19 Q. And did you fill out this form or did you
20 merely review it and sign it?

21 A. I would have reviewed it and signed it.

22 Q. To what extent would you familiarize yourself
23 with the information contained in such a document?

24 A. At that point in time, not -- not very
25 much.

1 Q. And for the reason that you were just getting
2 into the process of learning these acquired plans as of
3 early 1999? I think that's what you said.

4 A. Right, yeah. Severe staffing issues at that
5 point in time.

6 Q. What caused that?

7 A. The HR staff broke apart in mid 1998,
8 including my benefits group.

9 Q. Meaning what, in terms of your staffing?

10 A. Marj Rybka was probably the only person that
11 was left from prior to June of 1998 in the benefits
12 area, one of the few left.

13 Q. What about Paul Reynolds, which side would he
14 have fallen on?

15 MR. FISCHER: Objection. Go ahead.

16 A. Paul Reynolds would have been the head of
17 legal at that point in time, purely head of legal, was
18 that -- my understanding.

19 BY MR. MEYER:

20 Q. What, is he in-house counsel?

21 A. Yes.

22 Q. He's not with Keating's firm, if you know?

23 A. Paul Reynolds?

24 Q. Yes.

25 A. No, he's not with Keating's firm.

1 Q. He's still at Fifth Third, right?

2 A. Yes.

3 Q. So he advises HR generally and benefits
4 generally?

5 A. At that point in time, yes.

6 Q. So your staff at that point, you're saying,
7 consisted of Marj Rybka as far as holdovers from
8 1998?

9 A. Yes.

10 Q. Does that mean you had a new staff with a
11 fresh start in '99 or you didn't have anybody?

12 A. A little bit of both. No one for a little
13 bit and we staffed -- we were staffing up over that
14 next year.

15 Q. Internally or external hires?

16 A. We were bringing in primarily external --
17 actually, a little bit of both, but primarily
18 external.

19 Q. So for the first part of 1999, who were you
20 working with in your department other than Marj
21 Rybka?

22 A. Within my department?

23 Q. Yes.

24 A. Dick Levo would have come on at that point in
25 time.

1 Q. Where did he come from, what department?

2 A. He was from, I believe, U.S. Shoe.

3 Q. So he was a new hire?

4 A. Yes. He came on about the same time --
5 roughly the same time I did.

6 Q. And he was hired in your department?

7 A. Yes.

8 Q. And he was one of your direct reports?

9 A. No. He would have reported to Marj.

10 Q. So who else did you have on board by early
11 1999?

12 A. I hired a health and welfare manager.

13 Q. Who was that?

14 A. Lori Shields.

15 Q. Lori?

16 A. Lori Shields.

17 Q. Did she have any responsibilities with regard
18 to these acquired plans?

19 A. From a health and welfare standpoint. Not
20 from the ESOP plan.

21 Q. Okay. So who all did you have available to
22 work with you on the ESOP plans?

23 A. The --

24 Q. If anybody?

25 A. The three retirement people were Marj, Dick

1 Levo and Shirley Thomas.

2 Q. And what did Ms. Thomas do?

3 A. She's primarily defined benefit pension
4 calculation, clerical, non-exempt employee.

5 Q. Anybody else at that time?

6 A. Not working directly on the plans.

7 Q. Did Dick Levo work directly on the ESOPs?

8 A. Yes.

9 Q. What about Marj Rybka?

10 A. Yes.

11 Q. And Lori, did she work directly in the ESOPs
12 or not?

13 A. No.

14 Q. So as far as the ESOPs are concerned, in your
15 department it was you, Dick Levo and Marj Rybka?

16 A. That's correct.

17 Q. And you say there were, what, five or six,
18 including Suburban?

19 A. Not at that point in time. At that point in
20 time Suburban may have been it. Suburban may have been
21 it as far as an ESOP that I'm aware of at that point in
22 time.

23 Q. Okay. The other four or five you mentioned
24 occurred after the Suburban or before or what?

25 A. After.

1 Q. Now, to whom did you recommend that, in the
2 cleanup process, Fifth Third employees who were
3 non-Suburban employees would be allowed into this
4 Suburban ESOP? To whom did you make that
5 recommendation?

6 A. Paul Reynolds.

7 Q. Who had the final say? I mean, how was a
8 decision come to?

9 MR. FISCHER: Objection to form. Two
10 questions.

11 A. Could you repeat the question, please?

12 BY MR. MEYER:

13 Q. I'll break it down. How was the decision
14 made? What was the process?

15 A. Would have made a recommendation to Paul
16 Reynolds and he -- we probably would have discussed
17 it -- and I say probably because I do not remember --
18 probably would have discussed it with the internal
19 ERISA committee as an informational-type item. And
20 Paul would have made the final decision.

21 Q. Okay. What's the ERISA committee? Tell me
22 about that.

23 A. Committee required by ERISA that monitors
24 investment performance, claims -- any kind of claim for
25 benefits under the plans and review any kind of

1 amendments for making the plans.

2 Q. Does this committee have any authority to not
3 permit proposed amendments or to permit proposed
4 amendments? What's their authority in that regard?

5 MR. FISCHER: Objection. Calls for legal
6 conclusion. Go ahead, if you know.

7 A. I'm honestly not sure what their final
8 authority is. They're obviously made aware of anything
9 we're doing. Paul Reynolds would have had amendment
10 authority at that point in time.

11 BY MR. MEYER:

12 Q. Okay. In what capacity did he have amendment
13 authority? What was his title that gave him this
14 authority?

15 A. Paul had -- counsel, our attorney, and, also,
16 he was the head of human resources.

17 Q. Who was on the ERISA committee at that time?
18 How did that -- what was the make-up?

19 A. It would have been other executive vice
20 presidents at Fifth Third.

21 Q. So they're all Fifth Third employees?

22 A. Yes.

23 Q. And their monitoring capacity was with regard
24 to all ERISA plans?

25 A. Yes.

1 Q. Now, you said Paul Reynolds -- did you say
2 Paul Reynolds probably submitted this issue for review
3 by the ERISA committee of amending the plan to allow
4 current Fifth Third employees into the Suburban ESOP?

5 A. The committee would have been aware that we
6 were amending the Suburban plan, either before or after
7 it was done.

8 Q. Okay. That's just -- that's the routine
9 practice, right?

10 A. Yes.

11 Q. So you don't have a specific recollection in
12 this instance of how the committee -- ERISA committee
13 became aware of this proposed amendment?

14 A. I don't.

15 Q. Or de facto amendment?

16 A. I really don't remember.

17 Q. What would be the usual course, that you
18 would submit these items to the ERISA committee or Paul
19 Reynolds or both or either?

20 A. It would be either.

21 Q. In this case, could it have been you that
22 submitted this amendment issue to the ERISA committee,
23 or do you know for a fact that it wasn't?

24 MR. FISCHER: Objection to form.

25 A. I really don't remember. I don't remember

1 how it took place. I usually present -- it would
2 depend on how the -- what the amendment was. I mean,
3 if they're administrative-type items, we clean those up
4 once a quarter to make the committee aware.

5 If we're changing strategy of Fifth Third and
6 design, we would make them aware building up to that.
7 And I would do most of that. Paul is the chair of that
8 committee today. He was not then. So one of us would
9 have talked about amending the Suburban plan.

10 BY MR. MEYER:

11 Q. What category would that have fallen into,
12 the administrative that's submitted at the end of a
13 quarter?

14 A. I update the committee -- at that point in
15 time when we were doing many, many acquisitions, I
16 would update the committee almost in every meeting with
17 just a schedule of acquired plans that were still
18 active.

19 Q. How often did the ERISA committee meet in
20 that time frame?

21 A. Usually once a quarter.

22 Q. Do they keep minutes?

23 A. Yes.

24 Q. So if this committee reviewed the proposed
25 amendment to allow Fifth Third employees in the

1 Suburban plan, that would appear in their minutes at
2 some point?

3 A. I would think so.

4 Q. In the ordinary course, it would be in the
5 minutes?

6 A. I really -- I mean, I don't recall for that
7 time period back in --

8 Q. Okay. Would there be any paperwork to
9 document the review by that committee of this
10 amendment?

11 A. Not that I recall. Not specifically that I
12 recall.

13 Q. Okay. So it could have simply been presented
14 in a verbal fashion to this committee?

15 A. Yes.

16 Q. It would have -- would they -- is it just an
17 item of information or do they actually vote on whether
18 the amendment is approved or disapproved, recommended,
19 not recommended?

20 A. I don't remember at this time period whether
21 they would have voted on it or not.

22 Q. Okay. Paul Reynolds was the chairman at that
23 time?

24 A. No, not at that time.

25 Q. Who was the chairman at that time?

1 A. Mike Keating.

2 Q. Is he still with the company?

3 A. No.

4 Q. Is this the first instance the Suburban
5 ESOP -- is this the first instance during your
6 employment with Fifth Third where you had to deal with
7 cleaning up an ESOP from an acquired organization?

8 A. I think it was the earliest acquisition. I
9 don't know if it was the first one that we dealt with
10 in cleaning up. I don't remember, timing-wise, where
11 it would have fell.

12 Q. Does this cleaning up process occur every
13 time that you have an acquisition that involves a
14 plan?

15 A. Yes.

16 Q. Okay. You started in September and you
17 cleaned this one up in early 1999. If you can revert
18 back -- is that correct?

19 A. I don't know that it was early '99. I
20 actually think it was later than that.

21 Q. Do you recall when the amendment was?

22 A. I don't. I don't remember a date.

23 Q. It was April 1999. Does that ring --

24 A. Okay.

25 Q. -- a bell with you?

1 A. No. No.

2 Q. But, whether before or after, you had been
3 involved in this cleaning up process of, what, four to
4 six ESOPs of acquired organizations?

5 A. Yes.

6 Q. And let me clarify this. To your
7 recollection, this Suburban ESOP is the only plan where
8 a part of the cleanup process was to allow current
9 Fifth Third employees into the plan?

10 MR. FISCHER: Objection. We've gone through
11 this already.

12 A. As I answered before, I honestly don't
13 specifically remember. The plans would be amended --
14 the plans would be amended whether there was employees
15 moved to that plan or employees -- or the plan merged
16 in -- whether Fifth Third was merged into the plan or
17 the plan merged into Fifth Third, I don't recall. But
18 they would have followed that type of -- that type of
19 administration process.

20 BY MR. MEYER:

21 Q. Okay. Do you recall your thought process,
22 your rationale for making this recommendation in the
23 case of the Suburban ESOP for allowing current Fifth
24 Third employees into the Suburban plan?

25 A. Yes.

1 Q. What was your rationale?

2 A. Fifth Third's -- from a benefits standpoint,
3 we try to first make a determination before we buy a
4 company whether we're going to merge that plan,
5 terminate before we buy it, depending on what the IRS
6 rules are at that point in time.

7 If we take the plan, which is what would have
8 happened here in Suburban -- we took the plan, meaning
9 we became the sponsor.

10 So our understanding of the code is, is you
11 can't terminate -- you can't terminate the plan.
12 Although -- unless all the assets are out of the plan.
13 We try to move all of the employees to the Fifth Third
14 benefit package. That's -- we try to do it on the date
15 of acquisition or as close there as we can thereafter.

16 And with the inventory of plans that you
17 would build, we try to deal with the plans as quickly
18 as we could. So I would have made a recommendation for
19 a method -- for some technique to merge this plan or
20 terminate this plan.

21 Q. And it's my understanding you came up with
22 this technique, is that correct, in what you've said?

23 A. Yes.

24 Q. And as I understand the mechanism for these
25 participants getting into the Fifth Third -- what do

1 you call it, the master plan?

2 A. Yes.

3 Q. The technique for these employees getting
4 into the master plan is via a rollover option?

5 MR. FISCHER: Objection.

6 BY MR. MEYER:

7 Q. Is that what you said? Tell me what you said
8 before about the rollover.

9 A. When they were given the assets from the
10 Suburban plan, they could -- they could take it, roll
11 it to an IRA, roll it to the Fifth Third plan. Their
12 eligibility in the Fifth Third plan, I would believe,
13 and I don't know this legally at that point in time,
14 but they would have -- we would have amended the Fifth
15 Third plan to make them an eligible participant with
16 the contribution from the Fifth Third -- from Fifth
17 Third into that plan -- into the Fifth Third plan.

18 Q. Since you've been there, about how many plans
19 do you think have ultimately merged into this master
20 Fifth Third plan?

21 A. Into the qualified plan --

22 MR. FISCHER: Now, you're distinguishing,
23 Rick, just so we're clear, between merging and
24 terminating; is that right? You said merged. I
25 just want to make sure we're --

1 A. Merged into the master profit sharing plan,
2 15 to 30.

3 BY MR. MEYER:

4 Q. Okay. How many plans have you, quote,
5 cleaned up, as you say?

6 A. A guess would be in excess of 50.

7 Q. How many were cleaned up by terminating the
8 plans?

9 A. Half of them, 25.

10 Q. And when the plans are terminated, are the
11 participants then given the option to roll their assets
12 into the main Fifth Third plan?

13 A. Well, the Fifth -- in a defined contribution
14 plan, we don't allow a DB plan to roll into ours, but a
15 defined contribution plan as the ESOP is, our plan
16 allows -- the IRS code's changed a little bit in this
17 area, but it would allow someone to transfer their plan
18 whether they're coming from an employer or from a
19 acquired plan, and some would be and some would not
20 be.

21 Q. And then part of that process is, if need be,
22 you amend the Fifth Third -- existing Fifth Third plan
23 to allow these new participants to roll their assets in
24 from the other plans? Is that what you said?

25 A. Well, the plan -- the plan would allow them

1 to -- if they take their account and roll it, the plan
2 allows that in general. If we merge the plan, there
3 would be an amendment done.

4 Q. There would be what?

5 A. There would be an amendment done to the Fifth
6 Third plan.

7 Q. Getting back --

8 MR. FISCHER: We've been going about an hour.

9 Can we take a break?

10 MR. MEYER: Yeah, that's fine.

11 (A recess was taken from 10:00 to 10:07.)

12 BY MR. MEYER:

13 Q. Okay. We're on Exhibit 17, if you would.
14 Have you had a chance to look at this?

15 A. Yes.

16 Q. That is your signature at the bottom of the
17 first page?

18 A. Yes.

19 Q. Would you say in the ordinary course Marjorie
20 Rybka prepared this?

21 A. Yes.

22 Q. If you look on the second page of Exhibit 17,
23 in the middle under 13a, it says, Total plan assets as
24 of the beginning. It's about \$1.2 million. Do you see
25 that?

1 A. Yes.

2 Q. That means at the beginning of this
3 particular plan year, right?

4 A. Yes.

5 Q. And then the assets at the end of the plan
6 year would be a little over \$3 million. Do you see
7 that?

8 A. Yes.

9 Q. Since this is an ESOP, the major plan asset
10 would be the company stock, correct?

11 A. That's correct.

12 Q. At this time that would be the -- if you
13 know -- the Fifth Third stock?

14 A. Well, I think the acquisition took place
15 during this time period, so it could be at the
16 beginning of the year it was Suburban stock. I don't
17 know that factually. And at the end of the -- if the
18 acquisition in between, it would have been transferred
19 over to Fifth Third.

20 Q. Now, does this particular document explain
21 how much of that has already been allocated to
22 participants' accounts or how much is in the -- of
23 those assets is still in the suspense account?

24 A. I don't know. I'd have to guess.

25 Q. Okay. You can assume with me that it's not

1 specifying here. What document would tell you as of
2 the end of a plan year how much -- how many assets --
3 how many shares of stock are still in the suspense
4 account?

5 A. It would be the accounting records for this
6 plan.

7 Q. Where are the accounting records for this
8 plan?

9 A. I don't know.

10 Q. Should they be in that locked storage room?

11 A. No.

12 Q. Where will they be?

13 A. I have no idea.

14 Q. Why would they not be in that locked storage
15 room with the Suburban files?

16 A. Because, one is, we wouldn't do the
17 accounting for the plan.

18 Q. Who does the accounting?

19 A. On this plan, I don't know. I don't know who
20 did the accounting on this plan.

21 Q. You say a company outside of Fifth Third?

22 A. It could be. It could be. I honestly don't
23 know.

24 Q. What are the two choices? Could it be
25 somebody in Fifth Third?

1 A. Well, for this plan year it could have been
2 someone at Suburban, someone outside Suburban. I'm
3 not -- I'm not sure who would have been doing the
4 recordkeeping at that point in time.

5 Q. Do you know when Fifth Third started doing
6 the recordkeeping on this account?

7 A. I do not.

8 Q. What led you to believe that these records
9 would not be in your storage room?

10 A. We wouldn't just keep the accounting records
11 for the ESOP plans as a general rule.

12 Q. Okay. Again, on page 2 of Exhibit 17 under
13 item 14, it gives two figures, does it not, plan income
14 and plan contributions?

15 A. Yes.

16 Q. You agree it says plan income of about \$1.9
17 million for that plan year; is that right?

18 A. Yes.

19 Q. Would stock appreciation be considered
20 income?

21 A. Yes.

22 Q. Even if that's due to stock exchange between
23 companies?

24 MR. FISCHER: Objection to the term
25 exchange.

1 BY MR. MEYER:

2 Q. I'm following up on your comment before as
3 this may have started out as Suburban stock --

4 A. Right.

5 Q. -- as if -- as part of the merger there was a
6 stock exchange and there was a premium paid by Fifth
7 Third, would that show up as plan income, to your
8 knowledge?

9 A. To my knowledge, yes.

10 Q. And if the Fifth Third stock split, would
11 that show up as plan income?

12 A. To the sense if there was income generated
13 from the split, yes.

14 Q. Then the other number there is plan
15 contributions of 284,434. Do you see that?

16 A. Yes.

17 Q. And I take it that would be information that
18 Marj Rybka put on here, to the best of your
19 knowledge?

20 A. Yes, to the best of my knowledge.

21 Q. Do you know where that money would have come
22 from to make that contribution?

23 A. I would tell you that I don't, because this
24 is -- I believe it was a leveraged ESOP. I'm not sure
25 exactly how the contributions get reported, whether

1 this is a release or whether it was a contribution from
2 outside the plan into the plan. I'm not -- I would
3 tell you that I'm not confident enough to say that.

4 Q. How does a release work?

5 A. There's shares released as the loan is paid
6 down inside the leverage.

7 Q. How does the loan get paid down?

8 A. By the plan -- by the company, to the best of
9 my knowledge.

10 Q. So in this case the \$284,434 would have been
11 paid by Fifth Third, or would it have been paid by
12 Suburban, or do you know?

13 A. I don't know in this case. I can't
14 specifically tell you which one it is.

15 Q. Would the documentation for this contribution
16 be in your storage room files?

17 A. Not that I'm aware of. Not that I know of.

18 Q. What would?

19 A. Why wouldn't it?

20 Q. No. That kind of record, where would it
21 ordinarily be maintained?

22 A. I would say in -- whoever is doing the plan
23 accounting and the bank accounting would have that
24 record.

25 Q. So if it was a payment by Fifth Third, that

1 would show up in the Fifth Third accounting records?

2 A. Yes. If Fifth Third had an ESOP and there
3 was a contribution, it would be in the Fifth Third
4 accounting records.

5 Q. Who would maintain those records? Who would
6 be the custodian of those records?

7 A. It would either be in our trust accounting
8 area or general accounting area.

9 Q. Who is in charge of your trust accounting?

10 A. At this point in time?

11 Q. Yes, sir.

12 A. I don't know. I don't know.

13 Q. Who is in charge of your general accounting
14 at this time?

15 A. The controller is Dave Debrunner.

16 Q. Dave what?

17 A. Debrunner.

18 Q. Can you help Patti out on that one?

19 A. D-e-b-r-u-n-n-e-r.

20 Q. Are you familiar with a company called
21 Bransford that does this accounting work for plans such
22 as this?

23 A. No.

24 Q. Have you attempted to make a determination of
25 how many unallocated shares there were as of the end of

1 this plan year 6/30/98?

2 A. I do not remember doing it at the time and I
3 have not done it, to my knowledge.

4 Q. When you recommended that this plan be opened
5 up to current Fifth Third employees, did you have any
6 idea of how many unallocated shares were in the
7 suspense account for this Suburban ESOP?

8 A. Unallocated shares?

9 Q. Yes, sir.

10 A. Yes, I would have had to know that at some
11 point in time.

12 Q. Do you have any recollection of the ballpark
13 number of how many shares there were?

14 A. I do not.

15 Q. What's your understanding of unallocated
16 shares?

17 A. Shares not allocated to the participants.

18 Q. So it's fair to say those would be shares in
19 the suspense account of that ESOP?

20 MR. FISCHER: Objection.

21 BY MR. MEYER:

22 Q. Does that ring a bell with you, that
23 terminology?

24 A. Yes, that terminology rings a bell. I don't
25 know that that -- I don't know that I would define it

1 that way. I'm not disagreeing, I just honestly don't
2 know. The ESOP accounting is not the simplest thing in
3 the world.

4 Q. What's your understanding of a suspense
5 account?

6 A. My understanding is it's shares that -- that
7 are released being held for use in the plan.

8 Q. Now, do you know how many unallocated shares
9 as of 6/30/98 eventually got allocated to non-Suburban
10 Fifth Third employees, an exact or approximate
11 number?

12 A. No.

13 Q. When you made this recommendation, did it
14 concern you as to how many unallocated shares there
15 were that were -- had the potential for being allocated
16 to non-Suburban Fifth Third employees?

17 MR. FISCHER: Can I hear that question again?

18 (The record was read.)

19 A. I guess I would ask -- I'm not sure what you
20 mean by concern.

21 BY MR. MEYER:

22 Q. Did that factor into your recommendation at
23 all?

24 A. Yes.

25 Q. I mean, when you think about it?

1 A. Yes.

2 Q. Okay. What was the significance of the
3 number of unallocated shares in your thought process
4 for making that recommendation?

5 A. In terms of winding down the plan, it would
6 have been what the final allocation was going to be on
7 a per participant basis.

8 Q. So how did you determine the final allocation
9 on a per participant basis?

10 A. We took the number of people we added and
11 divided into the shares that were available.

12 Q. So according to the amendment, each
13 participant, non-Suburban Fifth Third participant, got
14 the same allocation, correct, by the arithmetic you
15 just described, irrespective of --

16 A. The non-Suburban.

17 Q. Fifth Third.

18 A. So they were not a Suburban employee prior to
19 the acquisition?

20 Q. Correct.

21 A. Yes, that's correct. I believe that's
22 correct.

23 Q. As you say, you took the total number of
24 unallocated shares and divided that by the number of
25 employees, correct?

1 A. Yes.

2 Q. You didn't proportion it into the amount of
3 income earned by that employee participant any given
4 year? They all got the same amount?

5 A. That's right. We did not.

6 Q. It's what your amendment seems to say?

7 A. Right.

8 Q. Now, was that part of your recommendation?

9 A. Yes. Yes.

10 Q. And what was your thinking in making that
11 recommendation?

12 A. Well, the group that we had -- the group that
13 we made eligible for that plan mirrored a larger
14 distribution that Fifth Third was doing with restricted
15 stock. This was a group that wasn't eligible for the
16 other restricted stock grant. So in an effort to give
17 the non-eligible group for the restricted stock a
18 benefit, we made an allocation to them by amending the
19 Suburban plan.

20 Q. So when you say it mirrored your other offer
21 of -- what did you say, non-restricted stock?

22 A. A restricted stock.

23 Q. Restricted stock?

24 A. Right.

25 Q. You say mirrored, it was complimentary,

1 whoever didn't get the one was offered the other; is
2 that correct?

3 A. That's correct.

4 Q. Okay.

5 A. In general terms.

6 Q. And who was offered the restricted --
7 entering the restricted stock plan?

8 A. It was based on years of service. Employees
9 with certain years of service got an allocation of
10 shares.

11 Q. So your overall intent was to see to it that
12 the entire complement of employees had some sort of a
13 benefit plan?

14 MR. FISCHER: Objection.

15 A. Well, it wasn't a benefit plan. It was an
16 equity grant, but yes. The -- the stuff that was
17 outside the Suburban plan was an equity grant.

18 BY MR. MEYER:

19 Q. What did I say? Read back my --

20 A. Plan.

21 Q. The word?

22 A. Plan distribution. Plan in terms of being
23 qualified.

24 Q. Let me work with the terminology that you
25 used. At the end of the day, each employee, as a

1 result of these two plans, the one that -- the
2 restricted stock?

3 A. Right.

4 Q. Or non-restricted?

5 A. Restricted.

6 Q. Restricted stock?

7 A. Right.

8 Q. And then the other one -- the other plan
9 being this amendment to the Suburban ESOP, at the end
10 of the day, all your employees would have some equity
11 position in Fifth Third. Was that your overall
12 intent?

13 MR. FISCHER: Objection to form.

14 A. Let me clarify and say there were Fifth Third
15 employees who were not eligible for either. There was
16 a group of employees, primarily new service or low
17 service employees, that we did a restricted grant to.
18 Then there was employees who were made eligible under
19 the Suburban plan who received a distribution --
20 received a allocation of shares under the Suburban
21 plan.

22 BY MR. MEYER:

23 Q. Okay. And I need to ask you, define the
24 group that got the non-restricted stock.

25 MR. KIRK: Restricted.

1 BY MR. MEYER:

2 Q. Or restricted stock.

3 MR. MEYER: Thank you.

4 A. The restricted stock equity grant, I don't
5 remember exactly. It was based on years of service. I
6 just don't recall the particulars. Non-officer and
7 some years of service. Non-officer at Fifth Third and
8 some years of service.

9 BY MR. MEYER:

10 Q. Okay. Was this a human resources initiative
11 to get these type -- these two types of employees into
12 an ownership position?

13 A. There was a lot of reasons for doing it.
14 Yes, that would be one of the reasons. Retention,
15 restriction. There's a restriction on the stock which
16 helps retain. That's the whole idea of the
17 restriction.

18 Q. Thank you. Now maybe I'll be able to
19 remember restriction.

20 A. Okay.

21 Q. Were you in discussions with people from
22 human resources about devising such initiatives to
23 retain employees?

24 A. Yes.

25 Q. Tell me some people who would be involved in

1 those meetings.

2 A. Paul Reynolds, the human resource management
3 team at that point, myself, the head of HR. I'm not
4 sure who the head of HR was at that point, but --

5 Q. Were there any other plans devised to
6 implement this initiative to assist in the retention of
7 employees?

8 A. Not at that point in time, no. I don't
9 recall.

10 Q. Have there been more since?

11 A. Please?

12 Q. Have there been more since in terms of these
13 benefit plans, ways to create equity holdings by the
14 employees?

15 A. It's ongoing at Fifth Third.

16 Q. Had it been ongoing when you arrived on the
17 scene?

18 A. Yes.

19 Q. Are there still meetings to devise new ways
20 of giving equity to employees as part of a retention
21 policy? It seems to me the more acquisitions you have,
22 the more important it is to try to get people to retain
23 their employment.

24 A. No, I said -- oh, I'm sorry.

25 Q. Go ahead.

1 MR. FISCHER: Objection. I don't think
2 that's necessarily a question.

3 BY MR. MEYER:

4 Q. Have there been more initiatives over the
5 years, recent years?

6 A. No, less.

7 Q. Okay. Again, if you look at Exhibit 17,
8 page 2 at the top, under item 7a, Total participants.
9 Do you see that?

10 A. Yes.

11 Q. Where it says at the beginning and ending of
12 the plan year, there were 67 participants -- do you see
13 that?

14 A. Yes.

15 Q. From your knowledge of this plan, would those
16 all be former Suburban employees at that time frame; in
17 other words, before you opened it up in 1999?

18 A. Generally, yes.

19 Q. Let's look at Exhibit 18.

20 (Plaintiffs' Exhibit 18 was marked for
21 identification.)

22 Q. Have you had a chance to review Exhibit 18?

23 A. Okay.

24 Q. Have you?

25 A. Yes.

1 Q. Do you recognize this type of a document?

2 A. Yes.

3 Q. This is a form 5500 which was filed by Fifth
4 Third in regard to the ESOP?

5 A. Yes.

6 Q. Suburban ESOP?

7 A. Yes.

8 Q. Okay. And this is signed by you on the first
9 page?

10 A. Yes.

11 Q. And this is for the succeeding plan year;
12 that is, beginning July 1, 1998 and ending June 30,
13 1999; is that correct?

14 A. Yes.

15 Q. And this is a slightly different form because
16 it relates to a plan having more than 100
17 participants?

18 A. Yes.

19 Q. Is that right? Very much the same types of
20 information as on the 5500-CR from the prior year?

21 A. Yes.

22 Q. So what occurred is that -- if you'll look at
23 page 2 of Exhibit 18 and 7a, the number of fully vested
24 participants went from 67 to 1,649. Do you see that?

25 A. Yes.

1 Q. And would that be as a result of your
2 recommendation and the adoption by Fifth Third of your
3 recommendation that current Fifth Third employees be
4 permitted into this Suburban ESOP?

5 A. Yes.

6 Q. So if you do the arithmetic, it looks like
7 1,582 Fifth Third employees following the amendment
8 qualified to enter into the Suburban ESOP?

9 MR. FISCHER: Objection.

10 BY MR. MEYER:

11 Q. Would you agree?

12 A. I would agree that there was employees added.
13 The exact number, depending on terminations through
14 that period -- thereabouts was roughly -- approximately
15 that number.

16 Q. Okay. I was giving a maximum number. It
17 could be even a few more than that if some Suburban
18 employees left?

19 A. That's correct.

20 Q. Okay. And then on page 5, which is Bates
21 number SU0278 -- do you see that?

22 A. Yes.

23 Q. What has occurred with regard to the assets
24 from beginning to end of this plan year?

25 A. They have decreased by approximately half.

1 Q. Talking about \$1.4 million?

2 A. Right.

3 Q. Do you know why that occurred?

4 MR. FISCHER: Objection.

5 A. Primarily due to benefit payments to
6 participants.

7 BY MR. MEYER:

8 Q. Okay. So correct me if I'm wrong, but what
9 was occurring was, is that as you had let employees in,
10 you were also terminating the plan and letting them
11 receive their benefit payments; is that correct?

12 MR. FISCHER: Objection to the termination
13 part of that question.

14 A. The distribution could be to -- you
15 categorized it to payments to people we were putting
16 in, and it could have been people in the plan or people
17 that we put in.

18 BY MR. MEYER:

19 Q. I didn't say which.

20 A. One or the other.

21 Q. One or the other?

22 A. Right. Participants under the plan.

23 Q. Okay. Would those payments have to be made
24 in connection with terminating the plan under an
25 ESOP?

1 A. No.

2 Q. So what could have triggered the right, other
3 than termination of plan, to receive a payment?

4 A. Termination of the employee, or employee
5 leaves the employment of Fifth Third.

6 Q. Now, on the second to last page of
7 Exhibit 18, see where it says, Fees and commissions
8 paid by plan?

9 A. Yes.

10 Q. \$8,064. Do you see that?

11 A. Yes.

12 Q. Okay. It appears that's the only fee paid in
13 that plan year --

14 A. Over --

15 Q. -- as reported on this form?

16 A. Over \$5,000.

17 Q. That payment was made to the Keating law
18 firm?

19 A. Yes.

20 Q. Were they the only law firm for this plan
21 year advising Fifth Third?

22 A. In general, I would say yes.

23 Q. For any of the time that you were involved
24 with the Suburban ESOP, were you advised by any legal
25 counsel other than Paul Reynolds or an attorney from

1 Keating's firm?

2 A. Related just to the Suburban plan?

3 Q. Yes, sir.

4 A. I can't answer that with 100 percent surety.
5 It's what I remember, but I do not -- I can't say for
6 100 percent.

7 Q. Do you recall any other firm that you might
8 have consulted with regard -- in regard to the Suburban
9 ESOP other than Paul Reynolds and the Keating law
10 firm?

11 A. I don't specifically remember asking anyone
12 else about the -- about Suburban.

13 Q. If you'd look at Exhibit 19.

14 (Plaintiffs' Exhibit 19 was marked for
15 identification.)

16 Q. Mr. Girton, what is Exhibit 19?

17 A. It is the 5500 for the Suburban ESOP for the
18 plan year '99 to 2000.

19 Q. Did you sign this form?

20 A. Yes.

21 Q. I notice that Mr. Levo signed this and not
22 Ms. Rybka. Is she still with Fifth Third or not?

23 A. She is not.

24 Q. When did she leave?

25 A. I don't know. I would say 2001, 2002 time

1 period.

2 Q. Would you say she didn't sign this in April
3 of '01 because she was no longer there?

4 A. No.

5 Q. So she could have remained on for that year
6 and possibly into '02?

7 A. Yes.

8 Q. Where is she employed these days, if you
9 know?

10 A. I believe Marj is retired.

11 Q. Did her husband work for Fifth Third, to your
12 knowledge?

13 A. Yes.

14 Q. Is he still there?

15 A. No.

16 Q. He left before she did, if you know?

17 A. I believe so.

18 Q. Now, if you'll look at page 2 of Exhibit 19
19 under item 6, the total number of participants. Do you
20 see where it says 1,696?

21 A. Yes.

22 Q. Okay. That has -- it went up from the prior
23 year, correct, from 1649 to 1696?

24 A. Yes.

25 Q. Okay. Any new participants would be Fifth

1 Third employees, not Suburban, correct? Or should I
2 say non-Suburban Fifth Third employees?

3 A. That would be the common sense. I honestly
4 do not believe that there were people added, but I
5 don't know that factually. But my guess is it was
6 probably just purely a head count correction between
7 the two years.

8 Q. Again, all these additional people from Fifth
9 Third would have gotten the same number of shares from
10 the suspense account as the rest of the Fifth Third
11 employees?

12 A. To -- yes, from what I remember, that's
13 correct.

14 Q. Do you remember how many shares each one
15 received?

16 A. I believe less than five. I know less than
17 20. I think it was less than five.

18 Q. If you'll look at page 4 of Exhibit 19 where
19 it says, Service provider information.

20 A. Yes.

21 Q. And the only service provider mentioned is
22 the Keating law firm; is that correct?

23 A. Yes.

24 Q. This year they were paid \$18,312 for their
25 services for the plan; is that correct?

1 A. Yes. That would have related to allowable
2 charges under the plan.

3 Q. This one, if you'll go back to -- I'll just
4 give the Bates number -- SU0255.

5 A. Okay.

6 Q. Under item 1a, Did the employee stock
7 ownership plan have an outstanding securities
8 acquisition loan within the meaning of Code section 133
9 during the plan year? Do you see that?

10 A. Yes.

11 Q. And it's indicating that it did not, correct?

12 A. That's correct.

13 Q. Do you know if that's because the loan had
14 been paid by this time?

15 A. Based on this answer, that would be yes. I
16 don't -- I don't recall whether it was or not. I hope
17 it was, since that's why we checked the box.

18 Q. Okay. Do you know when the loan was paid?

19 A. I do not.

20 Q. If you'll look at Exhibit 18, is there any
21 indication the loan is still unsatisfied as of that
22 prior plan year?

23 Let me ask you the question another way.

24 A. Okay.

25 Q. Was the loan paid by the time that you first

1 reviewed this plan, if you recall?

2 A. I don't. I do not recall.

3 Q. If it was paid, would there be any impediment
4 to an immediate termination of the plan despite any
5 payment limitations such as 415?

6 MR. FISCHER: Objection.

7 BY MR. MEYER:

8 Q. To your knowledge?

9 MR. FISCHER: Calls for a legal conclusion.

10 A. We always file for determination letter or
11 try to file for a determination letter before we
12 terminate a plan. That's general rule.

13 On an ESOP, I -- I'd be afraid to answer yes.
14 That would be my guess, but it would be a guess, that
15 there was really nothing else that stopped us --
16 nothing else that would stop us from winding down this
17 plan, but I honestly don't know.

18 BY MR. MEYER:

19 Q. Okay. Did you consider any alternatives --
20 in cleaning up or winding down this plan, did you
21 consider any alternatives to allowing Fifth Third
22 employees into the plan?

23 A. Yes.

24 Q. What alternatives did you consider?

25 A. Well, we would have started our thinking with

1 how long it's going to take to wind up the plan.
2 That's usually where we would start. And the impact in
3 the overall strategy to get employees on Fifth Third
4 plan, this plan, from what I recall, was going to have
5 an extremely long life if we didn't take some other
6 course of action because of the remaining assets and
7 the number of the participants that were left that were
8 from Suburban and still working at Fifth Third.

9 So the first -- first thing we would have
10 looked at was what's the length of time, is there a
11 different way of distributing the benefits. We would
12 have reviewed the timetable that was prepared. So that
13 would have been items considered.

14 There were several things, I don't remember
15 specifically, on how to amend the plan, what to do
16 with -- merge it or add participants or -- we would
17 have spent some time looking at several alternatives.

18 Q. At this point you don't remember what they
19 were in particular?

20 A. Oh, we definitely would have started with
21 just trying to understand the plan, the participants,
22 the assets. That would have been the first discussion.
23 Is there a way to do it from that standpoint. And then
24 we would have considered different alternatives on
25 merging if we could merge or -- there wasn't anything

1 really that jumps to mind that -- specifically what we
2 looked at.

3 Q. I want you to review a document and see if
4 any of this information was provided to you.

5 (Plaintiffs' Exhibit 20 was marked for
6 identification.)

7 A. The question is, have I seen this?

8 Q. I didn't ask any question yet.

9 A. Oh, sorry. Just want me to review it?

10 Q. I just want you to look at it, yeah. It's a
11 lengthy document. Let me ask you some preliminary
12 questions. In regard to Exhibit 20, you said that you
13 had read, in preparation for your deposition, several
14 memos from Attorney Steve Goodson. Is that what you
15 said?

16 A. Yes.

17 Q. You did that, what, last week?

18 A. Yes.

19 Q. Exhibit 20 is a memo from Steve Goodson dated
20 August 22, 1997, is it not?

21 A. Yes.

22 Q. Is this one of the memos that you reviewed?

23 A. No.

24 Q. So you were not provided this for your review
25 in preparation for this deposition?

1 A. No.

2 Q. Okay. It is a lengthy document. I'll just
3 ask you about several sentences, rather than take you
4 through the whole thing. You can certainly read these
5 sentences in context. If you look on page 1 under the
6 paragraph numbered 2 which says summary -- you see that
7 paragraph?

8 A. Yes.

9 Q. There is a reference in that paragraph to
10 Bransford retirement plan services. And I'll read the
11 sentence. Currently, Bransford retirement plan
12 services is providing the recordkeeping services for
13 these plans. Do you see that?

14 A. Yes.

15 Q. Okay. Now, having read that sentence, does
16 that refresh your recollection that Bransford at some
17 point was doing the accounting for this plan?

18 A. Honestly, no.

19 Q. Okay. When you reviewed the plan, did you
20 see any recordkeeping by this company called
21 Bransford?

22 A. No.

23 Q. The next sentence refers to Dan Hogans, an
24 attorney with Housley, Kantarian and Bronstein, and
25 then the note is, is continuing to provide legal

1 services with respect to these plans.

2 I'll ask you, does that refresh your
3 recollection you may have received any legal advice
4 from the law firm of Housley, Kantarian and Bronstein
5 in regard to this Suburban ESOP?

6 A. I did not.

7 Q. In that same paragraph, it says, Although
8 these Suburban plans are now the responsibility of
9 Fifth Third, pursuant to the affiliation agreement,
10 Housley Kantarian is to remain involved with these
11 plans. Do you see that?

12 A. Yes.

13 Q. To your knowledge, did they have any
14 continuing involvement as of your advent into these
15 plans?

16 A. No, not that I'm aware of.

17 Q. Okay. What is your understanding of that
18 sentence, these Suburban plans are now the
19 responsibility of Fifth Third? What role did Fifth
20 Third have with regard to these plans, to your
21 knowledge?

22 MR. FISCHER: Objection.

23 A. We would be the sponsor.

24 BY MR. MEYER:

25 Q. Okay. Were you also the successor trustee,

1 if you know?

2 A. I don't know, sitting here. I can look at
3 one of the documents.

4 Q. If you look on page 1 of Exhibit 20, above
5 where it says -- page 1, the second paragraph, where it
6 states, quote, One document we need is the completely
7 executed document in which Fifth Third accepted
8 appointment as successor trustee under each of these
9 plans. Do you see that?

10 A. Yes.

11 Q. Have you ever seen that document?

12 A. Not that I recall.

13 Q. Do you know what the role of a trustee is
14 with regard to an ESOP such as the Suburban ESOP?

15 MR. FISCHER: Objection. Calls for a mighty
16 legal conclusion, a mighty legal knowledge. If
17 you can answer the question, go ahead.

18 A. Primary function would be to hold the
19 asset.

20 BY MR. MEYER:

21 Q. To what?

22 A. To hold the asset, safeguard the asset.

23 Q. To hold it for whom?

24 A. The plan.

25 Q. Okay. How about the plan beneficiaries, is

1 that your understanding of what a trustee's role is?

2 A. Yes.

3 Q. The next paragraph at the bottom of page 1 of
4 Exhibit 20 talks about the 401(k) plan that was
5 inherited from Suburban. Are you familiar with that
6 plan?

7 A. Not specifically.

8 Q. In the course of this memo, Mr. Goodson talks
9 about a section 415 problem with the 401(k) plan. Do
10 you have any knowledge of that?

11 MR. FISCHER: Objection. It's not what it
12 says.

13 BY MR. MEYER:

14 Q. You don't need to read it in that regard. I
15 mean, do you have any recollection of a 415 problem
16 with the 401(k) that was inherited from Suburban?

17 A. Not specifically. My honest answer -- the
18 best answer I could probably give you is that probably
19 nine out of ten acquisitions that we do, we have plan
20 problems. I do not remember this one specifically.

21 Q. If you'll look back to page 3 of
22 Exhibit 20.

23 A. (Witness complies.)

24 Q. Do you see where it says, Overview of ESOP?

25 A. Yes.

1 Q. In the second paragraph of that section it
2 begins, In the black book. Do you see that
3 paragraph?

4 A. Yes.

5 Q. Do you see where it says -- four lines down
6 where it says, quote, The plan will continue to cover
7 only former Suburban Federal employees and no other
8 unrelated Fifth Third employees. Do you see that
9 sentence?

10 A. Yes.

11 Q. When you reviewed the Suburban ESOP, did
12 anyone tell you that that was the design of the plan?

13 MR. FISCHER: Objection.

14 A. I do not remember being told that at that
15 time, during that time period.

16 BY MR. MEYER:

17 Q. Okay. Do you know why Mr. Goodson is making
18 that comment, what that is based on?

19 A. I don't remember from that time period if I
20 was -- I could guess, based on reading some of the
21 documents last week.

22 Q. Okay. But when you made that recommendation,
23 you were not aware that -- of this memo, correct, from
24 Mr. Goodson?

25 A. I was not. I was not.

1 Q. Were you aware of any documents at the time
2 you made your recommendation that would support
3 Mr. Goodson's comment that the plan would continue to
4 cover only former Suburban Federal employees and no
5 other unrelated Fifth Third employees?

6 A. I don't recall being told that at that point
7 in time. That doesn't mean I was not.

8 Q. Okay. Well, that was my last question. My
9 current question is, did you see any documents that
10 would have supported Mr. Goodson's comment?

11 A. Back at the time this memo was written?

12 Q. Back at the time you made your recommendation
13 that the plan be opened up to current Fifth Third
14 employees.

15 A. I probably wouldn't have looked at documents
16 then in a whole lot of detail.

17 Q. Okay. On the bottom of that same page, it
18 makes a reference to, Housley Kantarian is to file the
19 form 5310. Do you see that?

20 A. Yes.

21 Q. Do you know what a form 5310 is?

22 A. That's the -- I believe the termination
23 form.

24 Q. Do you know if Housley Kantarian prepared
25 that or whether the Keating law firm prepared that for

1 the Suburban ESOP?

2 A. The 5310 that I'm aware of for this plan was
3 prepared, I think, by my staff.

4 Q. Let me show you Exhibit 21.

5 (Plaintiffs' Exhibit 21 was marked for
6 identification.)

7 Q. Mr. Girton, I'll represent to you that this
8 is a collection of documents related to the 5310 that
9 your office prepared. And if you wouldn't mind paging
10 through there for just a minute.

11 MR. MEYER: We'll go off the record.

12 (A recess was taken from 11:10 to 11:13.)

13 BY MR. MEYER:

14 Q. Mr. Girton, as I told you, I represented to
15 you that this Exhibit 21 consists of a collection of
16 documents related to the determination letter from the
17 IRS terminating the plan. Would you agree with that
18 characterization?

19 A. Yes.

20 Q. And it appears to me the only one you signed
21 was the power of attorney and declaration of
22 representative?

23 A. Yes.

24 Q. Signed on March 30 of 2000; is that
25 correct?

1 A. That's correct.

2 Q. Would you say that this termination was
3 approved in the spring of 2000?

4 A. Yes.

5 Q. To be specific, it looks like May 23, 2000?
6 Next page, I think it is. Second last page.

7 A. Yes.

8 Q. The application, which is part of Exhibit 21,
9 doesn't appear to be dated. The application must have
10 been made sometime in March of 2000?

11 MR. FISCHER: Objection.

12 BY MR. MEYER:

13 Q. Let me ask you this. The objection is
14 probably well taken.

15 On the third page of this exhibit, there's a
16 letter from the Internal Revenue Service dated 3/16/00
17 from the employee plans specialist acknowledging that
18 they received Fifth Third's request for a determination
19 letter.

20 A. Yes.

21 Q. Do you see that?

22 A. What date did you say?

23 Q. March 16, 2000. I believe you're looking at
24 a later one.

25 A. Wrong one. Sorry.

1 Q. Page 3 of the exhibit.

2 A. Yes.

3 Q. So, in the usual course, that was probably
4 submitted sometime in March of 2000?

5 A. Yes.

6 Q. Does that mean all the benefits were paid out
7 by that time, plan assets were allocated and paid
8 out?

9 A. I think it was actually probably not. The
10 benefits had probably not been completely paid out.

11 Q. Do you know when the benefits were paid
12 out?

13 A. If my memory serves me correctly, they
14 won't -- it was the -- the plan was wound down to a few
15 participants that they couldn't find and eventually the
16 plan merged -- those benefits were merged into another
17 plan that we have. Or that benefit was merged into a
18 plan, the rollover.

19 Q. So the people you couldn't find are still the
20 designated beneficiaries of those assets?

21 A. Yes.

22 Q. It's now part of the Fifth Third plan?

23 A. It's part of a -- another plan that we have
24 with --

25 Q. Let me show you Exhibit 22.

1 (Plaintiffs' Exhibit 22 was marked for
2 identification.)

3 Q. Do you recognize Exhibit 22?

4 A. Yes.

5 Q. Is this one of the documents you reviewed in
6 preparation for your deposition?

7 A. Yes.

8 Q. And that is a document you reviewed last
9 week?

10 A. Yes.

11 Q. Had you ever seen this document prior to last
12 week?

13 A. Yes.

14 Q. Under what circumstances had you previously
15 seen this Exhibit 22?

16 A. There was a meeting -- I'm going to be
17 horrible here from the time frame, but I'm going to say
18 at least probably a year ago, when kind of -- for lack
19 of a better term, this issue kind of arose. There was
20 a meeting between some Suburban executives, some
21 ex-Suburban executives and some Fifth Third executives
22 to discuss. And I believe I remember seeing that
23 document -- this document being discussed at that
24 time.

25 Q. Were you part of that meeting?

1 A. Yes.

2 Q. Why was the meeting called, if you know?

3 A. Trying to understand -- I think Fifth Third
4 and the Suburban executives were trying to discuss this
5 whole issue.

6 Q. Had you seen this Exhibit 22 before that
7 meeting?

8 A. I honestly don't remember. I don't recall
9 seeing it.

10 Q. Is this a document that you considered when
11 you made the recommendation to open up the Suburban
12 ESOP to Fifth Third employees?

13 A. I don't recall specifically looking at it. I
14 am confident that it would have come -- the advice from
15 this would have come from counsel at that point.

16 Q. Mr. Reynolds or Mr. Goodson?

17 A. Mr. Goodson.

18 Q. That's back at the time that you made the
19 recommendation to open up the plan to Fifth Third
20 employees?

21 A. Right.

22 Q. You had an opportunity to review this
23 document last week. You reviewed it previously in a
24 meeting. And you've got a short opportunity to review
25 it here. There's a lot of numbers in here, but I would

1 like to walk through it to see what your understanding
2 is of this provision of this document. It's entitled,
3 Descriptive Timetable for Termination of Suburban
4 Bancorporation, Inc. ESOP. Do you see that?

5 A. Yes.

6 Q. Is this common -- is there commonly prepared
7 such a document when you acquire these ESOPs?

8 A. Not commonly.

9 Q. Well, what's the common situation? What do
10 you see -- what kind of document do you see?

11 MR. FISCHER: Objection. Go ahead.

12 A. Affiliation agreement, the acquisition -- the
13 merger, the main document would typically be where it
14 would be handled.

15 BY MR. MEYER:

16 Q. Okay. So the affiliation agreement typically
17 would tell you how to handle the inheritance of the
18 ESOP by Fifth Third in a merger acquisition?

19 A. The affiliation agreement, as a general rule,
20 would give us the responsibility of sponsorship of the
21 plan and to do what we need to do to act upon plan.

22 Q. Okay. Do you know if this descriptive
23 timetable that we're looking at, Exhibit 22, was part
24 of the affiliation agreement between Fifth Third and
25 Suburban? Do you know one way or the other?

1 A. I think it was referred to in the affiliation
2 agreement, the timetable we set forth.

3 Q. But you commonly do not see a timetable set
4 forth in these merger situations?

5 MR. FISCHER: Same objection.

6 A. There have been similar-type documents, but
7 not -- that's not the common practice.

8 BY MR. MEYER:

9 Q. Under A it is stating -- I'll paraphrase it
10 and you can tell me if you agree or disagree with my
11 paraphrase. Under paragraph 1A, it appears that
12 Suburban is going to make certain contributions during
13 the plan year ending June 30, 1997 to pay down the
14 loan?

15 MR. FISCHER: Objection.

16 BY MR. MEYER:

17 Q. Is that your understanding of 1A?

18 MR. FISCHER: Same objection.

19 A. Yes.

20 BY MR. MEYER:

21 Q. They'll pay down about \$2,451 in principal
22 and interest, under 1A, recognizing that that will
23 still leave unpaid interest of \$24,816; is that
24 correct?

25 MR. FISCHER: Same objection.

1 A. It's --

2 BY MR. MEYER:

3 Q. It's what it says?

4 A. Yes.

5 Q. And then under 1B, that interest is going to
6 be paid for by a surrender of 1,241 shares?

7 A. Yes.

8 Q. What's a surrender of shares? What does that
9 involve?

10 A. I'm assuming, and I don't know this, that
11 would be somehow transferring the shares back to
12 Suburban. I'm not real sure.

13 Q. Okay. Have you ever been involved in that?

14 A. No.

15 Q. So whether that becomes treasury stock or
16 whatever, you're not aware of the details?

17 A. No.

18 Q. Under 1C it states that as a result of the
19 principal and interest payments, 12,167 shares will be
20 released from collateral. Can you -- are you familiar
21 with that concept of releasing collateral?

22 A. A little bit.

23 Q. Did Fifth Third release any collateral in the
24 succeeding plan year --

25 A. Not that --

1 Q. -- year ending June 30, 1998?

2 A. I don't know.

3 Q. Where would that record be if they did?

4 A. At the record keeper's.

5 Q. That could either be Fifth Third or some
6 other company?

7 A. Yes.

8 Q. And if the records are being kept by Fifth
9 Third, are they in that storage room?

10 A. No.

11 Q. Where are they?

12 A. If Fifth Third is doing the recordkeeping, it
13 would either be in the trust department or in an
14 accounting department, if they were there.

15 Q. Okay. Releasing of the collateral, that's
16 what occurs in an allocation of the participants,
17 right?

18 A. I don't know that. I don't know enough about
19 it. Whether it goes to suspense or whether it goes
20 directly to the participants, I'm not sure.

21 Q. Okay. 1D, it states, The ESOP loan will be
22 discharged on June 30, 1997 to the extent possible
23 under the Code Section 415 limits. What's your
24 understanding of what that means?

25 A. It isn't written the way that I would have

1 wrote it, but my understanding is, is there's going to
2 be an allocation -- there's two thoughts going on in my
3 mind. One is, the loan's being let go but there's
4 going to be some resulting distribution to the
5 participants that needs to comply with 415.

6 Q. Do you know what the 415 limits are?

7 A. Back then, it was a percent or dollar amount
8 based on wages of what employee got -- you couldn't --
9 I can't put more in an employee's account than what the
10 IRS code would allow.

11 Q. If you'll drop down to 1E, it says, As of
12 June 30, 1997, the 85,104 shares remaining under
13 collateral from the prior plan year will be reduced by
14 6,046 shares applied to reduce the loan, 21,772 shares
15 released from collateral for allocation to
16 participants' accounts. Do you have an understanding
17 of what that means?

18 A. In general, yes.

19 Q. The suspense account started out with 85,104
20 shares of collateral. By the end of the year, they
21 would be down to 57,286 shares; is that your
22 understanding?

23 A. Yes.

24 Q. Now, in the next year, the year ending June
25 30, 1998, was there a further reduction in the shares

1 by allocations to participants' accounts, if you
2 know?

3 A. As far as I know, yes.

4 Q. And where would those records be to show the
5 accounts allocations?

6 A. With the record keeper.

7 Q. Which is either an outside company or Fifth
8 Third trust department --

9 A. Yes.

10 Q. -- or Fifth Third accounting?

11 A. Yes.

12 Q. Under 2A, I'll paraphrase. It states, the
13 loan is to be discharged either by June 30, 1997 or
14 June 30, 1998, if possible. Do you know if the loan
15 was fully discharged by you June 30, 1998?

16 MR. FISCHER: Objection.

17 A. I don't know. I would -- I would say yes --
18 based on what they had laid out up front, I would say
19 the loan was probably gone by the end of '98.

20 BY MR. MEYER:

21 Q. Okay. Based on the 5500 that we saw for that
22 plan year, does it appear that \$285,000 was contributed
23 in order to pay down the loan?

24 A. Yes.

25 Q. And, again, the records for that payment as

1 to who made it, if and when it was made, that's one of
2 three places?

3 A. Right.

4 Q. Outside company, trust department or
5 accounting department; is that right?

6 A. Yeah. I mean, I'm assuming that that
7 contribution was done, Suburban would have made it
8 under the process flow.

9 Q. Why do you think Suburban would have made
10 it?

11 A. Because this is their timetable.

12 Q. Under paragraph 2B, does that indicate to you
13 that the projected loan balance as of June 30, 1998 was
14 estimated to be \$286,287?

15 MR. FISCHER: Objection.

16 A. That paragraph indicates to me that they did
17 not forecast a surplus in this plan as of June 30,
18 1998.

19 BY MR. MEYER:

20 Q. As part of your reading of that, does that
21 mean that the loan would be paid down, satisfied in
22 full by paying \$286,287?

23 A. I think that's what this timetable says.

24 Q. Does this timetable forecast that that
25 amount, in fact, could be paid because it's less than

1 25 percent of the projected combined compensation of
2 the participants for that year?

3 A. I don't --

4 MR. FISCHER: Objection.

5 A. I don't think it says that.

6 BY MR. MEYER:

7 Q. Do you know what's meant by will be less than
8 25 percent of projected eligible payroll determined
9 based on available data as of June 30, 1997 in the
10 amount of \$328,137? Do you have an idea what that
11 means?

12 A. I think what they're saying is, is what
13 results is they will be able to distribute any
14 remaining asset under that plan without violating
15 415.

16 Q. Because the payroll will be --

17 A. Based on their data.

18 Q. The payroll will be that much greater than
19 the loan balance?

20 MR. FISCHER: Objection.

21 BY MR. MEYER:

22 Q. Is that what it says to you, or not?

23 A. Well, I don't know. I don't know what kind
24 of other assumptions they were making. I mean, they're
25 presenting -- my understanding is, this is a --

1 Suburban prepared this exhibit and they're representing
2 to me in 2B that they will be able to run this plan
3 down to a zero balance as of the end of June. That's
4 what it says to me.

5 Q. When you say zero balance, are you talking
6 about zero balance in the loan? Because this says,
7 resulting from the discharge of the ESOP loan on June
8 30, 1998, estimated at \$286,287.

9 A. They're representing that all of the money in
10 the plan would be allocated to participants.

11 Q. Where do you see that?

12 A. Well, that's -- that was my point on -- when
13 we talked about 1A, is the letter is written dealing
14 with the loan and participation in the same sentence.
15 To me, when you say will be less than the 25 percent of
16 the payroll, you're saying, I'm going to get rid of all
17 the assets under the plan. Whether you call it the
18 loan or the suspense account or whatever, that's --
19 that's what -- how I read it.

20 Q. 2B, in fact, doesn't say anything about
21 distributions or allocations, does it?

22 A. Yes.

23 MR. FISCHER: Objection.

24 A. It does to me.

25 BY MR. MEYER:

1 Q. Okay. But the verbiage it's using is
2 discharge of the ESOP loan on June 30, 1998, right?

3 A. Will be less than 25 percent of the projected
4 eligible payroll. That's distribution language.

5 Q. Okay. In a merger, how would Suburban know
6 what the projected payroll is? Isn't that a function
7 of who is hired and how much you're being paid by the
8 surviving company, in this case Fifth Third?

9 A. I think it's difficult for anyone to know at
10 this point in time when this was drafted what
11 payroll -- on either side. That would be very
12 difficult.

13 Q. Did --

14 A. But their --

15 Q. Go ahead.

16 A. I mean, the paragraphs you've covered to me
17 say two things. One is, is we will contribute and it
18 will not cause an excess. That's -- and based on that,
19 that's what we're going to do. And that didn't come
20 to -- that's not what happened. They contributed and
21 there was an excess asset.

22 Q. What's an excess?

23 A. Assets not allocated to participants.

24 Q. Do you know why they weren't?

25 A. Weren't allocated?

1 Q. Yes, sir.

2 A. You can't allocate if you're going to violate
3 415.

4 Q. Now, when you first looked at this plan, I
5 guess, sometime late '98 or early '99, was the loan
6 completely satisfied at that point in time?

7 A. I honestly don't remember. I just don't
8 remember specifically what happened at that point in
9 time.

10 Q. Okay. If the loan balance was approximately
11 \$286,000 and contributions were made to the plan by
12 somebody in the plan year ending June 30, 1998, would
13 you conclude that the loan was paid in full?

14 MR. FISCHER: Objection to form.

15 A. Ask me the question again.

16 BY MR. MEYER:

17 Q. If based on Exhibit 22, paragraph 2B,
18 estimating the loan balance to be \$286,287 -- and then
19 you see your 5500 which we looked at, Exhibit 17 --

20 A. Right.

21 Q. -- for the same plan year ending June 30,
22 1998 showing a contribution of \$285,000, would you
23 conclude that the loan was paid?

24 MR. FISCHER: Objection to form.

25 A. Yes.

1 BY MR. MEYER:

2 Q. So the excess you're talking about is value
3 of the collateral, value of the assets being more than
4 the loan balance, correct?

5 A. Yes. The shares in the plan were unallocated
6 and the loan appears to be paid off.

7 Q. Okay. So what's occurring is, as we talked
8 about before when you looked at the form 5500 and saw
9 \$1.9 million in income, you're looking mainly
10 depreciation of value of the stock causing an excess
11 over the loan balance. Is that one of the factors at
12 work here, creating the excess?

13 MR. FISCHER: Objection.

14 A. It would be one, and the contributions.

15 BY MR. MEYER:

16 Q. When an ESOP loan is paid, what documentation
17 do you ordinarily see?

18 A. I don't know. Just not -- it's been a little
19 bit since I've worked on a leveraged ESOP and I'm just
20 not involved necessarily in the accounting end of it.
21 I'm sure there's proof or a letter or something. I'm
22 just not aware.

23 Q. Okay.

24 MR. MEYER: Let's go off the record.

25 (Off the record.)

1 BY MR. MEYER:

2 Q. You testified before that under your analysis
3 it would take an extended period of time to terminate
4 this plan if you didn't open it up to Fifth Third
5 employees. Is that what you said?

6 A. Yes.

7 Q. Okay. And can you walk us through how you
8 made that determination?

9 A. We would have looked at the number of
10 participants left in the plan and what we can do under
11 the 415 rules in distribution.

12 Q. Since we're at the mercy --

13 A. One of the consideration --

14 Q. Since we're at the mercy at what records are
15 still available, which are not complete, I'll ask you
16 your recollection. Do you recall how many Suburban
17 employees were still on staff at Fifth Third, or
18 approximately?

19 MR. FISCHER: At what time are you talking,
20 Rick?

21 MR. MEYER: At the time that Jim was doing
22 the -- made his recommendation that it would take
23 a long time to terminate this plan.

24 A. I don't.

25 BY MR. MEYER:

1 Q. Based on HR records, how can that be
2 determined?

3 A. We would -- at that point in time we would
4 have had a merge code -- what we called a merge code in
5 our HR system.

6 Q. That identifies employees from various other
7 institutions?

8 A. Right.

9 Q. Is that record still available?

10 A. Could I -- that was three HR systems ago. I
11 don't think it's available in that record. I could
12 look today and tell you how many people are working
13 there today that worked for Suburban. I don't know
14 that I could go back and recreate at that point in
15 time.

16 Q. So what you'd be looking at is how many
17 Suburban people were employed at that time early
18 1999?

19 A. Yes.

20 Q. What their compensation was?

21 A. Yes. Yes.

22 Q. And how many shares remained unallocated or
23 in the suspense account?

24 A. Along with other -- I mean, that wasn't just
25 the decision. That was one of the factors.

1 Q. Okay. Do you have a recollection of about
2 how many shares were left unallocated?

3 MR. FISCHER: At this same time?

4 MR. MEYER: At that same time.

5 A. I don't know in terms of shares. The dollar
6 amount -- I want to say the dollar amount of
7 allocations that I remember that were left in that
8 plan -- and this could be entirely wrong -- was
9 somewhere between 200 and \$500,000 was left in that
10 plan.

11 BY MR. MEYER:

12 Q. So the closer to 200 would be less time to
13 terminate the plan; the closer to 500, the longer it
14 would take? Is that your -- is that what you would
15 consider the timing issue?

16 A. Yes.

17 Q. Okay. And the timing issue was one of
18 various issues that led you to make your
19 recommendation?

20 A. Yes, one of the issues.

21 MR. MEYER: Okay. That's all I have for
22 today.

23 THE WITNESS: Okay.

24 MR. MEYER: Pat, I would ask if we get more
25 documents related to what Jim's doing --

1 MR. FISCHER: Trust me, so would we.

2 MR. MEYER: Okay.

3
4

JAMES F. GIRTON

5
6
7 - - -
8 DEPOSITION CONCLUDED AT 11:51 A.M.

C E R T I F I C A T E

STATE OF OHIO :
: SS
COUNTY OF HAMILTON :

I, Patti Stachler, RMR, CRR, the undersigned, a
duly qualified and commissioned notary public within
and for the State of Ohio, do certify that before the
giving of his deposition, JAMES F. GIRTON was by me
first duly sworn to depose the truth, the whole truth
and nothing but the truth; that the foregoing is the
deposition given at said time and place by JAMES F.
GIRTON; that I am neither a relative of nor employee of
any of the parties or their counsel, and have no
interest whatever in the result of the action; that I
am not, nor is the court reporting firm with which I am
affiliated, under a contract as defined in Civil Rule
28(D).

IN WITNESS WHEREOF, I hereunto set my hand
and official seal of office at Cincinnati, Ohio, this
_____ day of _____, 2005.

My commission expires: Patti Stachler, RMR, CRR
October 5, 2008. Notary Public - State of Ohio

Elite Reporting Agency, LLC
513-233-3000

DEPOSITION OF: JAMES F. GIRTON
TAKEN: MAY 23, 2005

| Page | Line Number | Correction Made |
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[illegible]

Date